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No. 07-9995

In the Supreme Court of the United States

MICHAEL RIVERA,

PETITIONER,

v.

ILLINOIS,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a state trial court's good faith error in denying a criminal defendant's peremptory challenge requires reversal of a subsequent conviction as a matter of federal law, when that error did not deprive the defendant of a fair trial by an impartial jury or otherwise violate any federally protected right.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. Petitioner Has Not Suffered The Loss Of Any Federal Right, And Therefore Nothing In Federal Law Requires A New Trial 9

II. There Is No Constitutional Entitlement To The Flawless Application Of State Law 16

A. Federal Law Limits On The Federal Judicial Power Are Inapposite 17

B. Petitioner's Remaining Authorities Require Violations Of Specific, Constitutional Rights 21

C. Petitioner's Proposed Rule Would Require A New Trial For The Misapplication Of Countless State Procedural Rules 25

TABLE OF CONTENTS—Continued

III. The Denial Of Petitioner's Peremptory Challenge Did Not Violate Any Due Process Right 28

A. The Due Process Clause Does Not "Constitutionalize" All State Law Rules Capable Of Affecting The Composition Of State Juries 29

B. Neither The Undefined Risk Of Bias In Jurors Not Subject To Removal For Cause, Nor The Specific Facts Of This Case, Require The Recognition Of A New Due Process Right 30

1. There Is No Due Process Right To Peremptories On The Ground That They Reduce The Risk Or Appearance Of Juror Bias 31

2. No Risk Of Bias In This Case Warrants The Recognition Of A Novel Due Process Right 36

C. Property-Based Due Process Standards Do Not Apply To State Rules Of Criminal Procedure, But Petitioner Received All The Process He Was Due In Any Event 40

TABLE OF CONTENTS—Continued

IV. The Erroneous Denial Of A Peremptory Challenge Is Amenable To Harmless-Error Review 45

CONCLUSION 56

TABLE OF AUTHORITIES

Cases: **Page**

Am. Constr. Co. v. Jacksonville, T & K W. Ry. Co., 148 U.S. 372 (1893) 19, 29

Arizona v. Fulminante, 499 U.S. 279 (1991) 54

Ayshire Collieries Corp. v. United States, 331 U.S. 132 (1947) 18-19

Barclay v. Florida, 463 U.S. 939 (1983) 15

Batson v. Kentucky, 476 U.S. 79 (1986) 5, 12

Beck v. Washington, 369 U.S. 541 (1962) 25

Bd. of Regents v. Roth, 408 U.S. 564 (1972) 40

Brown v. North Carolina, 479 U.S. 940 (1986) 9

Busby v. Florida, 894 So.2d 88 (Fla. 2004) 48

Chandler v. Florida, 449 U.S. 560 (1981) 11

Conaway v. Polk, 453 F.3d 567 (4th Cir. 2006) . . . 33

Cooper v. California, 386 U.S. 58 (1967) 15

Cumberland Tel. & Tel. Co. v. United States, 260 U.S. 212 (1922) 19

Daniels v. Williams, 474 U.S. 327 (1986) 42, 44

TABLE OF AUTHORITIES—Continued

Dennis v. United States, 339 U.S. 162 (1950) 10

Dickerson v. United States, 530 U.S. 428 (2000) . . 23

Douglas v. California, 372 U.S. 352 (1963) . . . 44, 45

Dowling v. United States, 493 U.S. 342 (1990) . . . 41

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 12, 23

Escoe v. Zerbst, 295 U.S. 490 (1935) 42

Estelle v. McGuire, 502 U.S. 62 (1991) 40, 41

Evitts v. Lucey, 469 U.S. 387 (1985) 44, 45

Frazier v. United States,
335 U.S. 497 (1948) 11, 12, 47

Fuller v. Johnson, 158 F.3d 903 (5th Cir. 1998) . . 26

Fulton-Carroll Ctr. v. Indus. Council of N.W. Chicago, 628 N.E.2d 1121
(Ill. App. Ct. 1993) 20

Georgia v. McCollum, 505 U.S. 42 (1992) 10, 12

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 19

Glover v. United States, 531 U.S. 198 (2001) 16

TABLE OF AUTHORITIES—Continued

Gomez v. United States, 490 U.S. 858 (1989) . . 18, 29

Gray v. Mississippi, 481 U.S. 648 (1987) 10, 22

Hedgpeth v. Pulido, 129 S. Ct. 530 (2008) 45

Hernandez v. New York, 500 U.S. 352 (1991) 43

Hicks v. Oklahoma, 447 U.S. 343 (1980) 42

Holland v. Illinois, 493 U.S. 474 (1990) 31

Holloway v. Arkansas, 435 U.S. 475 (1978) 54

In re Estate of Howell,
867 N.E.2d 559 (Ill. App. Ct. 2007) 20

In re Murchison, 349 U.S. 133 (1955) 21, 31, 32

Irvin v. Dowd, 366 U.S. 717 (1961) 21, 49, 50

J.E.B. v. Alabama, 511 U.S. 127 (1994) 12

Klahn v. Wyoming, 96 P.3d 472 (Wyo. 2004) 48

Lewis v. Casey, 518 U.S. 343 (1996) 44

Lisenba v. California, 314 U.S. 219 (1941) 41

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 40

TABLE OF AUTHORITIES—Continued

Mathews v. Eldridge, 424 U.S. 319 (1976) 41

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 47, 48

Medina v. California, 505 U.S. 437 (1992) 41

Miller-El v. Dretke, 545 U.S. 231 (2005) 28, 35

Moran v. Dillingham, 174 U.S. 153 (1899) 19

Mu'Min v. Virginia, 500 U.S. 415 (1991) 11

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 33-34

Neder v. United States, 527 U.S. 1 (1999) . . . *passim*

Nguyen v. United States, 539 U.S. 69 (2003) . . 18, 19

Offutt v. United States, 348 U.S. 11 (1954) 31, 32, 33

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, (474 U.S. 327 1986) 42

Patton v. Yount, 467 U.S. 1025 (1984) 10, 49

People v. Bell, 702 N.W.2d 128 (Mich. 2005) 15

People v. Nitz, 848 N.E.2d 982 (Ill. 2006) 6

TABLE OF AUTHORITIES—Continued

People v. Phillips, 831 N.E.2d 574 (Ill. 2005) 16

People v. Thurow, 786 N.E.2d 1019 (Ill. 2003) 6

People v. Williams,
827 P.2d 612 (Colo. Ct. App. 1992) 27

Peters v. Kiff, 407 U.S. 497 (1972) 24, 31, 32, 55

Pointer v. United States,
151 U.S. 396 (1894) 10, 11

Reynaga v. Cammisa,
971 F.2d 414 (9th Cir. 1992) 18

Rice v. Collins, 546 U.S. 333 (2006) 35

Riegel v. Medtronic, 128 S. Ct. 999 (2008) 16

Rose v. Mitchell, 443 U.S. 545 (1979) 24

Ross v. Oklahoma, 487 U.S. 81 (1988) . . . . . *passim*

Rushen v. Spain, 464 U.S. 114 (1983) 47, 48

Schneble v. Florida, 405 U.S. 427 (1972) 53

Sheppard v. Maxwell, 384 U.S. 333 (1966) 33

Smith v. Phillips, 455 U.S. 209 (1982) 33

Smith v. Robbins, 528 U.S. 259 (2000) 45

TABLE OF AUTHORITIES—Continued

State v. DiFrisco, 645 A.2d 734 (N.J. 1994) 48

State v. Hickman, 68 P.3d 418 (Ariz. 2003) 38

State v. Lindell,
629 N.W.2d 223 (Wis. 2001) 48, 49

State v. Neuendorf,
509 N.W.2d 743 (Iowa 1994) 48

Stilson v. United States,
250 U.S. 583 (1912) 12, 13, 15

Strickland v. Washington,
466 U.S. 668 (1984) 54, 55

Sullivan v. Louisiana, 508 U.S. 275 (1993) . . . 49, 51

Sunal v. Large, 332 U.S. 174 (1947) 42

Swain v. Alabama, 380 U.S. 202 (1965) 12, 46

Thiel v. S. Pac. Co., 328 U.S. 217 (1946) 23

Tumey v. Ohio, 273 U.S. 510 (1927) . . . 21, 31, 32, 33

Turner v. Louisiana, 379 U.S. 466 (1965) 32, 33

United States v. Am.-Foreign Steamship Corp.,
363 U.S. 685 (1960) 18

TABLE OF AUTHORITIES—Continued

United States v. Annigoni,
96 F.3d 1132 (9th Cir. 1996) 47, 50

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 46, 53, 54

United States v. Harbin,
250 F.3d 532 (7th Cir. 2001) 39

United States v. Hasting, 461 U.S. 499 (1983) 53

United States v. Johnson,
495 F.3d 951 (8th Cir. 2007) 14

United States v. Lane, 474 U.S. 438 (1986) . . . 40, 41

United States v. Martinez-Salazar,
528 U.S. 304 (2000) . . . . . *passim*

United States v. Morrison, 449 U.S. 361 (1981) . . . 47

United States v. Patterson, 215 F.3d 776 (7th Cir.),
vacated in part by Patterson v. United States,
531 U.S. 1033 (2000) 12, 26, 47

United States v. Polichemi,
219 F.3d 698 (7th Cir. 2000) 14, 33

Vasquez v. Hillery, 474 U.S. 254 (1986) . . . 24, 25, 55

Virginia v. Moore, 128 S. Ct. 1598 (2008) 26, 27

TABLE OF AUTHORITIES—Continued

Wainwright v. Witt, 469 U.S. 412 (1985) 9

Wardius v. Oregon, 412 U.S. 470 (1973) 39

Washington v. Recuenco, 548 U.S. 212 (2006) 45

William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtiss Marine Turbine Co., 228 U.S. 645 (1913) 30, 54

Wingo v. Wedding, 418 U.S. 461 (1974) 18, 54

Witherspoon v. Illinois, 391 U.S. 510 (1968) 22

Young v. United States ex rel. Louis Vuitton et Fils S.A., 481 U.S. 787 (1987) 22, 23

Zinermon v. Burch, 494 U.S. 113 (1990) 42

Constitutions, Statutes, and Rules:

U.S. Const. amend. VI 9

U.S. Const. amend. XXVI, § 1 26

705 Ill. Comp. Stat. 305/2 (2006) 2, 20

705 Ill. Comp. Stat. 305/2(1) (2006) 27

725 Ill. Comp. Stat. 5/115-4(f) (2006) 1

Ark. Code Ann. § 16-31-102(a)(4) (2008) 27

TABLE OF AUTHORITIES—Continued

Colo. Rev. Stat. § 13-71-105(1) (2008) 27

Colo. Rev. Stat. § 13-71-105(2)(f) (2008) 27

Colo. Rev. Stat. § 13-71-105(3) (2008) 27

Conn. Gen. Stat. § 51-217(a)(7) (2008) 26, 27

Miss. Code Ann. § 13-15-1 (2008) 26

Mo. Rev. Stat. § 494.425 (2008) 26

Neb. Rev. Stat. § 25-1601 (2008) 26

Ill. Sup. Ct. R. 341(h)(7) 16

Ill. Sup. Ct. R. 431 1

Ill. Sup. Ct. R. 434(a) 1

Ill. Sup. Ct. R. 434(d) 1, 14

Cook Cty. Gen. Ord. 1.2 20

Cir. Ct. Cook Cty. R. 0.4(c) 27

Miscellaneous:

4 William Blackstone, *Commentaries* 34, 35

TABLE OF AUTHORITIES—Continued

Major Robert Wm. Best, *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off*, 183 Mil. L. Rev. 1 (2005) 35

William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391 (2001) 34, 35

STATEMENT

On January 10, 1998, 16-year-old Marcus Lee was shot and killed. JA 100-101. Five members of the Insane Deuces street gang were arrested and charged with Lee's murder, including petitioner Michael Rivera, the gang's "chief enforcer" and the alleged shooter. JA 64. Petitioner was prosecuted on evidence that, without provocation, he shot Lee in the back of the head because he mistakenly believed that Lee was a member of a rival gang. JA 64, 100. The evidence further showed that petitioner bragged to fellow gang members about the killing. JA 64.

Pursuant to Illinois law, see Ill. Sup. Ct. R. 434(a), the twelve-person jury was seated in three, four-person panels, Vol. I at A84, A155, A227. As state law requires, see 725 Ill. Comp. Stat. 5/115-4(f) (2006); Ill. Sup. Ct. R. 431, the trial court questioned each prospective juror individually and, after identifying four legally qualified jurors, passed the panel to counsel for further questioning and to exercise any peremptory challenges, *e.g.*, Vol. I at A24-A66, A85-A107, A168-A204. Each side was allowed seven peremptory challenges, Vol. I at A4, which is the proper allocation under Illinois law, see Ill. Sup. Ct. R. 434(d).

In selecting the first panel, the trial court, without objection, excused four prospective jurors—three men and one woman—for cause. Vol. I at A33, A43-A44, A49, A58. The court then allowed defense counsel to exercise a peremptory challenge against an African-American woman. Vol. I at A73, A110. The prosecution declined to use any peremptories, and the court seated the first four jurors, Vol. I at A84, all of whom were women.

For the second panel, the trial court excused five prospective jurors for cause. Vol. I at A102, A120, A142, A147, A159. The defense objected to one of these dismissals, but the trial court excused her anyway because she understood little English, A145, A147, which disqualified her under Illinois law, see 705 Ill. Comp. Stat. 305/2 (2006). When the prosecution exercised its first peremptory challenge, against a woman, Vol. I at A109, defense counsel noted that both the challenged juror and petitioner were Hispanic; he also acknowledged that he had used his first peremptory against a prospective juror who, like the victim, was African-American, Vol. I at A109-A110. Defense counsel then exercised his second and third peremptories, removing a woman and a man, Vol. I at A128, A138, and the court seated the second panel, Vol. I at A155, A167, three women and one man.

The trial court began its selection of the third panel by examining prospective juror Deloris Gomez. Vol. I at A168. When questioned by the court, Gomez stated that she was a business office supervisor at Cook County Hospital. JA 29. She indicated that there was nothing that would affect her impartiality, and she had no doubt that she could be fair if selected. JA 29-32. After excusing three men for cause—all on the defense's request—the trial court tendered the third panel, including Gomez, to counsel for additional questioning. Vol. I at A185, A189, A193, A204.

Defense counsel questioned Gomez and two of the three remaining potential jurors. Vol. I at A207-A210. In response to counsel's inquiries, Gomez explained that she was a clerical supervisor at the hospital's orthopedic clinic, an out-patient facility located in a

separate building from the hospital. JA 32-33. Although she had some contact with the clinic's patients "[a]s far as checking them in," this would not bias her against petitioner. JA 32. After this brief questioning, defense counsel sought to exercise his fourth peremptory challenge against Gomez. He informed the court that, "with thanks, we would ask to excuse Mrs. Gomez." JA 33.

Outside the presence of the prospective jurors, the court indicated its concern that defense counsel had discriminated against Gomez who, the court observed, "appears to be an African American female." JA 34. Citing its obligation to protect "the citizen's right to sit as a juror," the court asked defense counsel to provide a basis for the challenge. *Ibid.* Counsel said he was "pulled in two different ways" by Gomez. *Ibid.* He "kn[e]w she has some kind of Hispanic connection given her name" but was concerned that she "on a daily basis sees those victims who are victims of violent crimes." *Ibid.* Counsel also acknowledged that he had accepted only one of the three African-American women tendered thus far. JA 35. The prosecution urged that Gomez be seated. JA 34-35.

The court overruled the peremptory challenge. JA 36. Not only was Gomez the second African-American woman defense counsel had sought to remove without cause, but his proffered basis was inadequate: Cook County Hospital may have a reputation for treating gunshot victims, but Gomez worked in the business office of a clinical division, not the emergency room. JA 35.

The court already had decided to seat Gomez, but defense counsel sought—and received—permission to

question her further, out of the other jurors' presence. JA 36. In response to additional questions, Gomez again explained that she did not work in the emergency room but in a separate building. JA 37. Although she sometimes saw gunshot victims when they came to pick up a prescription or for other non-emergency treatment, she was certain that she would have no bias against petitioner. JA 36-38.

Defense counsel renewed his request to strike Gomez, again out of her presence:

> My feeling [sic] are still the same. I feel that I'm trying to modify the composition of this panel. I'm not trying to * * * excuse a juror because of her race. But also I think I can also factor in the fact that she would now be out of the—by the fact that the jury is predominantly women, I'm trying to also get some impact from possibly other men in the case.

JA 39. Counsel then cited the "disturbing" nature of Gomez's employment. JA 40. The court again declined to remove Gomez, explaining that it had "considered her statements very carefully," found her to be "a very intelligent lady," and identified "no basis for cause." *Ibid.* The court permitted defense counsel to re-exercise its fourth peremptory challenge against a different juror via "back-strike," contrary to usual practice. JA 40-41, 139-140. The court then seated the third panel, Vol. I at A227, two men and two women. Without challenge, the court seated three men as alternate jurors. Vol. I at A245-A246.

After a three-day trial, the jury, with Gomez as foreperson, JA 44, found petitioner guilty of first-

degree murder, JA 103. After determining that the maximum sentence was justified and an extended term was warranted, the court sentenced defendant to 85 years in the Illinois Department of Corrections. JA 104.

On appeal, petitioner did not challenge the sufficiency of the evidence supporting his conviction, JA 63, 100, but in relevant part argued that the trial court committed reversible error when it failed to honor his peremptory challenge and seated Gomez, JA 64-66. The Illinois Appellate Court affirmed, agreeing with the trial court that defense counsel's proffered basis was inadequate, both because Gomez worked in a business office separate and apart from the emergency room and because "defense counsel admitted that he was striking Gomez because she was a woman, * * * describ[ing] this clear act of gender discrimination as an attempt to 'balance' the jury." JA 78-79. On further review, the Illinois Supreme Court remanded "for a limited hearing to allow the trial judge an opportunity to articulate the bases for his *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] rulings." JA 132.

On remand, the trial court explained that it found petitioner to have been motivated by gender discrimination. JA 136. The court noted that Gomez was the third woman that defense counsel had challenged peremptorily, and that counsel sought to remove her despite her testimony that she could be impartial. JA 135-136. Moreover, in lieu of a neutral explanation, counsel admitted that he sought to excuse Gomez because she was a woman—to obtain "input" from male jurors and more evenly "balance" the jury. JA 136.

On this record, the Illinois Supreme Court held that, at the time the trial court asked defense counsel to explain his peremptory challenge, the evidence did not support a *prima facie* case of discrimination. JA 157-158. Accordingly—putting aside counsel's admission that he had engaged in gender discrimination—the court held that Gomez should have been seated. *Ibid.* The court declined to find the trial court's error "structural," however, because there was "no evidence that [petitioner] was tried before a biased jury, or even *one* biased juror," nor was there even an argument "that Gomez was subject to excusal for cause." JA 164. Following this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), as well as its own decisions in *People v. Thurow*, 786 N.E.2d 1019 (Ill. 2003), and *People v. Nitz*, 848 N.E.2d 982 (Ill. 2006), the court applied harmless-error review to uphold petitioner's conviction, concluding that the evidence was so "overwhelming[ly]" adverse to petitioner that "any rational trier of fact would have found [him] guilty." JA 171. As a result, "Gomez's presence on the jury cannot be said to have prejudiced him," JA 166, and the erroneous denial of the peremptory challenge was "harmless beyond a reasonable doubt," JA 171. Because any federal constitutional error was harmless, the court had no occasion to decide the threshold question "whether the erroneous denial of a peremptory challenge is" even "an error of constitutional dimension." *Ibid.*

This Court granted certiorari on October 1, 2008.

SUMMARY OF ARGUMENT

Petitioner received a fundamentally fair trial before an impartial jury. That is all that the Constitution requires. His complaint is that trial court error deprived him of a peremptory challenge to which he was entitled under Illinois law, but such a state law deprivation is subject to Illinois' own harmless-error rules. Simply put, federal law does not determine the effect of any error in this case.

Petitioner seeks some federal footing for his claim, first by asserting that this Court routinely overturns judgments by "improperly constituted" tribunals, then by urging that the trial court's failure to honor one of his peremptories violated due process. Both theories fail. With the first, petitioner suggests a rule whereby federal courts must overturn state judgments for state law errors in the composition of state tribunals. But no such rule exists, and none of petitioner's authority implies one. It is for Illinois law to determine which "errors" in the composition of its tribunals are so profound that they render any resulting judgments void.

Petitioner's secondary argument—that the court's refusal to remove Gomez from the venire violated due process—likewise fails. It is a bedrock principle that parties have no constitutional right to peremptory challenges. And even if that were not settled law, petitioner's due process theories are meritless. Petitioner contends that uninhibited use of state-law peremptories is required to combat the "appearance" or "risk" of bias, either generally or specifically in this case, but the Constitution only prohibits actual bias, and there is no claim of such bias here (for petitioner

has never alleged that Gomez was subject to removal for cause), nor is there evidence to support such a claim. And to the extent that petitioner raises a distinct, procedural due process claim based on an entitlement to peremptories under Illinois law, he received robust pre- and post-deprivation process and thus cannot allege arbitrary treatment. His complaint is that a trial court's good faith error produced the wrong result, but such error does not violate procedural due process.

Petitioner's remaining point is that the erroneous denial of a peremptory challenge is not amenable to harmless-error analysis, but this claim fails on multiple grounds. Even if petitioner had suffered the violation of a constitutional right (and he did not), harmless-error review would apply. The loss of a peremptory challenge does not implicate the fundamental interests for which structural error is reserved, and courts can readily review such errors for harmlessness. Appellate courts routinely assess juror impartiality, a task made especially easy where, as here, there is no claim of actual juror bias. Alternatively, courts are well-equipped to address harmlessness in terms of the overall evidentiary record, without any intrusion on Sixth Amendment rights.

Accordingly, the judgment below must be affirmed.

ARGUMENT

I. Petitioner Has Not Suffered The Loss Of Any Federal Right, And Therefore Nothing In Federal Law Requires A New Trial.

Because the Illinois Supreme Court properly held that any constitutional error would have been harmless in this case, the court had no occasion to "decide whether the erroneous denial of a peremptory challenge is" even "an error of constitutional dimension in these circumstances." JA 171. In fact, petitioner did not suffer any constitutional violation, and this alone defeats his claim that federal law entitles him to a new trial. Even if the state trial court purportedly erred by misapplying *Batson*, no one's *Batson* rights were violated. Rather, petitioner seeks to vindicate the deprivation of his state law right to exercise a peremptory challenge, and Illinois law determines the effect of that error. In concluding that it need not decide whether there was constitutional error at all to resolve the appeal, the Illinois Supreme Court implicitly but squarely held that state law does not require a new trial for the deprivation of a peremptory strike. Accordingly, for this reason alone the judgment below must be affirmed.

Criminal defendants are constitutionally entitled to trial before "an impartial jury," U.S. Const. amend. VI, and any juror with views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" is subject to removal for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotations omitted); see also *Brown v. North Carolina*, 479 U.S. 940, 941 (1986) (O'Connor, *J.*, concurring in denial of

pet. for cert.) ("Challenges for cause permit the categorical and unlimited exclusion of jurors exhibiting an inability to serve fairly and impartially in the case to be tried"); see generally *Gray v. Mississippi*, 481 U.S. 648, 652 n.3 (1987) ("There is no limitation on the number of venire members who may be challenged for cause."). And just as the seating of a juror who should have been removed for cause violates the Sixth Amendment right to impartiality, see, *e.g.*, *Dennis v. United States*, 339 U.S. 162, 171-172 (1950), the converse is also true; jurors who are not subject to challenge for cause are considered to be impartial, see, *e.g.*, *Patton v. Yount*, 467 U.S. 1025, 1036-1040 & n.12 (1984) (impartial juror—one who "can lay aside his opinion and render a verdict based on the evidence"—is qualified for constitutional purposes and need not be dismissed for cause); *Pointer v. United States*, 151 U.S. 396, 412 (1894) (describing list of jurors, who had survived for cause challenges but remained subject to peremptory challenges, as "the list of impartial jurymen"). Petitioner has never claimed a right to remove Gomez for cause, nor could he, and petitioner was therefore tried and convicted by a constitutionally impartial jury.

It is not disputed that peremptory challenges may serve as an additional weapon against potential juror bias. See *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (peremptory challenges "are one means to achieve the constitutionally required end of an impartial jury," but "are not of constitutional dimension") (internal quotations omitted); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (peremptories "are but one state-created means to the constitutional end of an impartial jury and a fair trial"). And this is

especially true when these challenges are used to remove jurors whom the trial court erroneously failed to remove for cause, a traditional if not primary purpose of the peremptory. See, *e.g.*, *Martinez-Salazar*, 528 U.S. at 316 (using peremptory challenge to remove juror who should have been removed for cause was "in line with a principle reason for peremptories: to help secure the constitutional guarantee of an impartial jury"); *id.* at 319 (Scalia, *J.*, concurring in judgment) ("it may well be * * * one of the very purposes of peremptory challenges to enable the defendant to correct judicial error" in failing to remove a juror for cause).

But there are many tools to protect against juror bias, see, *e.g.*, *Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("courts have developed a range of curative devices" to combat juror bias attributable to media coverage), and rooting out bias is not the sole purpose of peremptory challenges. A party may exercise them "without reason or for no reason, arbitrarily and capriciously," *Pointer*, 151 U.S. at 408, and their "purpose" is therefore far broader: "to afford [a party] an opportunity beyond the minimum requirements of fair selection to express an arbitrary preference among jurors properly selected and fully qualified to sit in judgment on his case," *Frazier v. United States*, 335 U.S. 497, 506 (1948); see also *Mu'Min v. Virginia*, 500 U.S. 415, 424-435 (1991) (although parties may use peremptories to remove jurors based on their "general outlook on life," neither peremptories nor this "benefit" is constitutionally mandated). A party may deploy these challenges to remove venire members whom he fears are not predisposed in his favor, to accommodate a lawyer's unfounded suppositions, or—if petitioner

prevails here and every good faith but erroneous finding of unlawful discrimination in jury selection automatically results in a new trial—strategically on jurors (like Gomez) who may trigger *Batson* rulings that can later be used to force an automatic reversal. See generally *United States v. Patterson*, 215 F.3d 776, 779 (7th Cir.) (parties may use peremptories to "eliminat[e] unbiased jurors who a party believes may (perhaps *because* of their open minds) favor the other side"), *vacated in part by Patterson v. United States*, 531 U.S. 1033 (2000).

Accordingly, "unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges" simply "are not of federal constitutional dimension." *Martinez-Salazar*, 528 U.S. at 311. This Court has reaffirmed that bedrock principle time and again. See, *e.g.*, *id.* at 307; *J.E.B. v. Alabama*, 511 U.S. 127, 137 n.7 (1994); *McCollum*, 505 U.S. at 57; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *Batson*, 476 U.S. at 91, 98; *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Frazier*, 335 U.S. at 505 n.1; *Stilson v. United States*, 250 U.S. 583, 586 (1912). Simply put, "[t]he [peremptory] right is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guaranties of 'an impartial jury' and a fair trial." *Frazier*, 335 U.S. at 506 n.11.

Accordingly, "[t]his Court has sanctioned numerous incursions upon the right to challenge peremptorily," *Ross*, 487 U.S. at 90 (internal quotations omitted), including "limitations that could be viewed as effectively reducing the number of challenges available to a defendant," *Martinez-Salazar*, 528 U.S. at 314

(citing cases); see, *e.g.*, *Stilson*, 250 U.S. at 586-587 (upholding rule requiring co-defendants to share allotment of peremptory challenges). And the Court has specifically "rejected * * * the position that, without more, 'the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury.'" *Martinez-Salazar*, 528 U.S. at 313 (quoting *Ross*, 487 U.S. at 88). This is so even if the erroneous deprivation of the challenge likely changed the jury's composition, for the Court has also squarely rejected the corollary "that any error which affects the composition of the jury must result in reversal." *Ross*, 487 U.S. at 87 n.2; see also *id.* at 87 (although jury may have been different absent trial court's error, declining to "accept the argument that this possibility mandates reversal").

There was thus no constitutional violation in *Ross* in the fact that the defendant devoted one of his peremptories to remove a juror whom the trial court should have removed for cause, although the defendant went on to exhaust all of his peremptory challenges. The Court emphasized that the defendant had no constitutional entitlement to his peremptory challenges to begin with, see *Ross*, 487 U.S. at 88-89; see also *Martinez-Salazar*, 528 U.S. at 311, that error causing the deprivation of a peremptory is not a constitutional violation, see *Ross*, 487 U.S. at 88, and that the jurors who actually sat were not subject to challenge for cause, see *id.* at 86 ("None of [the] 12 jurors * * * was challenged for cause by petitioner, and he has never suggested that any of the 12 was not impartial."); see also *Martinez-Salazar*, 528 U.S. at 316 ("Nor did the District Court's ruling result in the seating of any juror who should have been dismissed

for cause."). It was immaterial that the defendant might have used an additional peremptory to challenge another member of the venire. See *Ross*, 487 U.S. at 87 ("Petitioner points out that had he not used his sixth peremptory challenge to remove Huling, he could have removed another juror, including one who ultimately sat on the jury."). There, as here, the loss of a peremptory challenge simply did not offend the defendant's constitutional rights.

Petitioner may contend that *Ross* is different, because here petitioner has identified the specific juror (Gomez) whom he would have removed. But this is not the fact on which the Court's holding in *Ross* turned, nor could it be. The Court acknowledged that the trial court's error "may have resulted in a jury panel different from that which would otherwise have decided the case," *ibid.*, and *Ross* would be a dead letter if all that were required to avoid its rule would be to identify some juror against whom the party would have used its lost peremptory. See *United States v. Polichemi*, 219 F.3d 698, 705 (7th Cir. 2000) (rejecting claim that *Martinez-Salazar* was distinguishable because Polichemi sought additional peremptories after using one to cure an erroneous, for cause denial, and defendant objected to jury as constituted); *United States v. Johnson*, 495 F.3d 951, 965 (8th Cir. 2007) (same, even though defendant used several peremptories to correct court's alleged for cause errors). In short, petitioner was tried before an impartial jury, and the court's failure to honor one of the seven peremptory challenges that Illinois law provides, see Ill. Sup. Ct. Rule 434(d), did not violate any constitutional right.

States always retain the "power to impose higher standards * * * than required by the Federal Constitution," "[a]nd when such state standards alone have been violated the State is free, without review by [this Court], to apply its own state harmless-error rule to such errors of state law." *Cooper v. California*, 386 U.S. 58, 62 (1967); see also *ibid.* (without "federal constitutional error," there is "no need * * * to determine whether the lower court properly applied its state harmless-error rule"); *Barclay v. Florida*, 463 U.S. 939, 951 n.8, 957-958 (1983) (plurality op.) (where State granted extra-constitutional protections at capital sentencing, violation of state protection did not trigger "federal harmless error analysis," and Florida Supreme Court therefore applied its own harmless-error standard). Thus, in *People v. Bell*, 702 N.W.2d 128, 138-139 (Mich. 2005), the Michigan Supreme Court recognized that, unlike a *Batson* violation, a misapplication of *Baston* resulting in the loss of a peremptory challenge deprived the party of a state law right, and choosing the applicable standard of review accordingly involved a pure question of Michigan law. In short, "[t]he privilege" of having peremptory challenges "must be taken with the limitations placed upon the manner of its exercise," *Stilson*, 250 U.S. at 587, and Illinois law does not require automatic reversal of petitioner's verdict.

Petitioner's jury was impartial, and unlike Illinois law, the Constitution provides no supplemental right to peremptory challenges. Accordingly, any interference with that right is at best a violation of state law, subject to state harmless-error rules, and Illinois law does not entitle petitioner to a new trial.

The judgment of the Illinois Supreme Court therefore must be affirmed.

II. There Is No Constitutional Entitlement To The Flawless Application Of State Law.

Although petitioner originally argued that before there can be federal, structural error, there first must be a federal *constitutional* violation, Reply in Support of Pet. 5, he now disavows that principle and asserts for the first time that he is entitled to a new trial without establishing any constitutional deprivation. His theory is that trial before any "defectively" or "improperly constituted" tribunal (Pet. Br. 12, 13)—even one that satisfies federal constitutional standards, so long as it is defective in some way under state law—requires a new trial as a matter of federal law. Having failed to advance this theory in the Illinois Supreme Court, and having implicitly rejected it in support of his petition, petitioner cannot properly raise this claim for the first time now. Under Illinois law, an appellant's failure to raise an argument results in waiver. See Ill. Sup. Ct. R. 341(h)(7); *People v. Phillips*, 831 N.E.2d 574, 581 (Ill. 2005). And petitioner's waiver of this argument in state court bars him from pressing it here. See *Riegel v. Medtronic*, 128 S. Ct. 999, 1011 (2008) (declining to address in first instance claim not briefed before court below nor raised in certiorari petition); see also *Glover v. United States*, 531 U.S. 198, 205 (2001).

Should the Court choose to address this theory in the first instance, it nevertheless fails on its merits, for petitioner nowhere identifies the federal law that requires his proposed result (though he admits that it is not of constitutional dimension). Pet. Br. 13, 18 n.3.

And critically petitioner's "rule" is impossible to square with this Court's express rejection of the claim "that any error which affects the composition of the jury must result in reversal." *Ross*, 487 U.S. at 87 & n.2.

In fact, petitioner merely cobbles together disparate lines of authority vacating judgments on a number of distinct grounds, none of which would even be necessary if there were an overarching rule requiring reversal whenever a tribunal is defectively composed. Moreover, none of the federal doctrines at work in petitioner's cases has any application here: they involve either (1) a violation of congressional limits on federal judicial power, producing judgments that are *ultra vires* and void as a matter of established federal law; or (2) federal constitutional violations resulting in an unconstitutionally biased adjudicator (not an issue here, see *supra* Part I), or the need to deter intentional race discrimination in jury selection (also not at issue here—indeed, if the state trial court erroneously deprived petitioner of a peremptory challenge, it was in an effort to protect jurors from unlawful bias).

A. Federal Law Limits On The Federal Judicial Power Are Inapposite.

Petitioner relies on several decisions involving tribunals' *ultra vires*, extra-jurisdictional acts. In these cases, federal courts acted beyond their lawful authority, and reviewing courts determined as a matter of federal law that the resulting decisions were therefore void—legal non-events by unofficial tribunals. Petitioner offers no authority for the distinct legal proposition, which he implicitly asks this Court to recognize, that federal law operates to void any state judgment by a tribunal whose composition

departs in some manner from what state law requires—even where, as here, state law itself does not recognize that departure as grounds for voiding the judgment.

Two of petitioner's cases involved *ultra vires* acts by federal magistrate judges who exceeded their statutory authority. In *Gomez v. United States*, 490 U.S. 858 (1989), the magistrate unlawfully presided over part of a federal felony proceeding. See *id.* at 875-876. And in *Wingo v. Wedding*, 418 U.S. 461 (1974), the magistrate violated an express congressional directive by conducting an evidentiary hearing on federal habeas corpus review. See *id.* at 472-474. The federal question in these cases was whether Congress had authorized the conduct in question, for without statutory authority the magistrate lacked the very "jurisdiction needed to preside." *Gomez*, 490 U.S. at 876. These were federal determinations about the lawful scope of a magistrate's power, and the court concluded in each that, as a matter of federal law, acts in excess of that scope are legally void. See, *e.g.*, *Reynaga v. Cammisa*, 971 F.2d 414, 417 (9th Cir. 1992) (act by magistrate outside his statutory authority is "beyond his jurisdiction and * * *, in essence, a legal nullity").

Petitioner's remaining authorities involved congressional limits on the lawful power of Article III appellate courts, and are therefore similarly inapposite. See *Nguyen v. United States*, 539 U.S. 69, 79-80 (2003) (violation of federal law for non-Article III judge to sit on appellate panel); *United States v. Am.-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960) (violation of judicial code provision limiting *en banc* participation to active judges); *Ayrshire Collieries Corp.*

v. United States, 331 U.S. 132, 135 (1947) (violation of federal statute to have only two judges sit on panel, which rendered judgment "void"); *Moran v. Dillingham*, 174 U.S. 153, 157-158 (1899) (violation of federal law "disqualified" judge who presided over trial court from sitting as member of appellate panel in same case).

In turn, each of these decisions (with the exception of *Ayrshire Collieries*) relied expressly on *Am. Constr. Co. v. Jacksonville, T & K W. Ry. Co.*, 148 U.S. 372 (1893), which held that any decision by a tribunal unauthorized by the Federal Judiciary Act is void *ab initio* as an act outside the court's lawful jurisdiction and is thus likely a legal non-event. See *id.* at 387 ("If the statute made [a judge] incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void"); see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (characterizing rule in *American Construction* as "jurisdictional"). For its part, the Court in *Ayrshire Collieries* relied on *Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm'n*, 260 U.S. 212 (1922), which likewise made clear that the statutory requirement that three judges sit on an appeal was a matter of federal "statutory power and jurisdiction," the breach of which rendered any resulting judgment "void and * * * without jurisdiction." *Id.* at 217, 219. And the *Nguyen* Court similarly recognized that placing a non-Article III judge on a federal appellate panel violated a "fundamental" limit on "judicial authority," namely "Congress' decision to preserve the Article III character of the courts of appeals." 539 U.S. at 79-80. Even by agreement, the parties could not authorize "the

participation of a non-Article III judge in the consideration of their appeals." *Id.* at 80-81.

None of these decisions has any bearing here. Each identifies jurisdictional limits on federal magistrates or appellate courts and refuses to give legal effect to *ultra vires* judicial acts as a matter of federal law. The Court in these cases did not purport to make a federal question of what is extra-jurisdictional for state courts constituted under state law, much less what the remedy is for an extra-jurisdictional act by a state tribunal. These are questions of state law, and Illinois law does not require a new trial here.[1] See *supra* p. 9, 15. Indeed, Gomez was "qualified" under Illinois law, which spells out juror qualifications in terms of factors such as character, integrity, judgment, residency, age, English literacy, and U.S. citizenship. See 705 Ill. Comp. Stat. 305/2 (2006). Petitioner has never argued that Gomez failed to satisfy any of these criteria. And notwithstanding the failure to honor one of petitioner's peremptory challenges, Illinois law does not treat his jury as an *ultra vires* tribunal whose acts are without legal effect. Indeed, such a rule of state law would

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[1] As another example of state law determining whether judgments by "improperly constituted" tribunals are void, Illinois law does not require courts to overturn or disregard judgments rendered by the improper department, division, or section of the Circuit Court of Cook County. See Cook Cty. Gen. Ord. 1.2; *Fulton-Carroll Ctr. v. Indus. Council of N.W. Chicago*, 628 N.E.2d 1121, 1123 (Ill. App. Ct. 1993); *In re Estate of Howell*, 867 N.E.2d 559, 561-562 (Ill. App. Ct. 2007). Petitioner's proposed federal rule would disregard this determination by the Illinois courts and require reversal.

have required the state supreme court to vacate petitioner's conviction regardless of any federal harmless-error analysis.

B. Petitioner's Remaining Authorities Require Violations Of Specific, Constitutional Rights.

The remaining authorities for petitioner's "rule"—that all decisions arising from an improperly constituted tribunal must be reversed as a matter of non-constitutional, federal law—involve actual violations of federal constitutional rights.

First, petitioner relies on a series of decisions involving an unconstitutionally biased judge or jury. In two, the judge had a direct personal interest in the case. See *Tumey v. Ohio*, 273 U.S. 510, 520, 530 (1927) (mayor presiding over criminal court would receive payments if he convicted defendants, but not if he acquitted, giving the adjudicator "a direct, personal, substantial pecuniary interest" in the outcome); *In re Murchison*, 349 U.S. 133, 134-135 (1955) (judge served as "'one-man judge-grand jury'" in closed-door proceedings and charged parties with criminal contempt based on those proceedings, then also served as required, "impartial tribunal" before whom the parties were tried for contempt). And in *Irvin v. Dowd*, 366 U.S. 717 (1961), this Court overturned the conviction of a capital defendant tried by an unconstitutionally biased jury. Eight of his twelve jurors indicated at voir dire that they already "had an opinion that petitioner was guilty and were familiar with the material facts and circumstances" of the case. *Id.* at 728.

Likewise, in *Gray*, the capital sentencing jury was unconstitutionally biased because the trial court excluded a juror for cause in violation of the Sixth and Fourteenth Amendment prohibition on "the exclusion of venire members 'simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" 481 U.S. at 657 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)). The error in *Gray* thus deprived defendant of his right to an impartial jury at sentencing, and this Court has since emphasized that *Gray*'s holding is limited to that context: "the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case." *Ross*, 487 U.S. at 87; see also *id.* at 87 n.2 ("As the dissent in *Gray* pointed out, the statement that any error which affects the composition of the jury must result in reversal defies literal application.").

These decisions, and the principle that defendants subjected to an unconstitutionally biased judge or jury may receive a new trial, do not support petitioner's proposed, general rule of automatic reversal. And, again, petitioner has never claimed that Gomez should have been excused for cause, nor could he, and therefore this case does not involve an unconstitutionally biased decision-maker.[2]

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[2] Petitioner also cites *Young v. United States ex rel. Louis Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (Pet. 15-16), involving a conflicted prosecutor rather than a biased judge or jury, but that case, too, turned on compelling indicia of partiality. In *Young*, a private attorney prosecuted a criminal contempt charge against his client's adversary—a patent conflict condemned by law and ethical canons. 481

Second, petitioner relies on decisions involving the purposeful and systematic exclusion of African-Americans and other groups from grand and petit jury service. But as these decisions and others in the same line make clear, reversal is required in such cases to deter discrimination and safeguard broader societal interests, including those of the excluded juror, not to comply with an hypothesized, automatic-reversal rule applicable whenever a tribunal is improperly constituted. See generally *Edmonson*, 500 U.S. at 616 ("Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors.").

Thus, in *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946), the Court concluded that the intentional exclusion of day laborers from the jury rolls did "violence to the democratic nature of the jury system" and, if permitted to continue, "would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status." *Id.* at 223-224. Not only was it essential to deter this misconduct and "guard against the subtle undermining of the jury system," but the Court identified the exclusion of day laborers as the real harm, regardless of "whether the petitioner was in any way prejudiced by the wrongful exclusion." *Id.* at

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U.S. at 805. As petitioner recognizes (Pet. Br. 18), moreover, this Court reversed the conviction in *Young* under the Court's general *supervisory* power. See 481 U.S. at 808. (The same was true of the civil judgment in *Thiel v. S. Pac. Co.*, 328 U.S. 217, 225 (1946).) This Court has no supervisory authority over state courts. See, *e.g.*, *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

225. The Court thus felt compelled to exercise its supervisory power over the lower federal courts and reversed the judgment, recognizing that proceeding in this manner eliminated the need to find prejudice. See *ibid.*

Likewise, in *Peters v. Kiff*, 407 U.S. 497 (1972), where African-Americans were systematically excluded from the defendant's grand and petit juries, a majority of the Court ordered a new trial for a white defendant—not because the Court believed he was prejudiced, but because of the broader harms that discrimination inflicts and the fact that the discrimination itself, regardless of its effect on the trial, violated the Constitution and federal law. See *id.* at 494, 498-499 (violation of federal criminal law and Constitution "occur[s] whether the defendant is white or Negro, whether he is acquitted or convicted," and requiring a showing of prejudice "takes too narrow a view of the kinds of harm that flow from discrimination in jury selection") (Op. of Marshall, *J.*); *id.* at 505-507 (relying heavily on federal statute criminalizing discrimination in access to jury service) (Op. of White, *J.*).

Vasquez v. Hillery, 474 U.S. 254 (1986), makes even clearer that its rule requiring reversal in cases of purposeful and systematic racial discrimination in jury service stems from the unique need to deter this misconduct: "the remedy we have embraced for over a century—the only effective remedy for this violation—is not disproportionate to the evil that it seeks to deter." *Id.* at 262 (footnote omitted); see also *id.* at 262 n.5 (citing *Rose v. Mitchell*, 443 U.S. 545 (1979), which provides, in part, "we believe such costs as do exist [in requiring automatic reversal] are

outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice," *id.* at 558); see also *Vasquez*, 474 U.S. at 266 ("the admittedly costly remedy of reversal of a conviction * * * obtained through a fair trial is necessary in order to eradicate and deter such discrimination") (O'Connor, *J.*, concurring).

In sum, authorities involving adjudicator bias or intentional discrimination in jury composition are inapposite. Petitioner did not seek to remove Gomez for cause and has never purported to establish that she was actually biased. See generally *Beck v. Washington*, 369 U.S. 541, 557-558 (1962) ("The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinion as to his guilt."). And far from vindicating anti-discrimination principles, petitioner seeks a rule that would undercut those principles by requiring automatic reversal anytime a judge errs in a good faith effort to prevent a *Batson* violation.

C. Petitioner's Proposed Rule Would Require A New Trial For The Misapplication Of Countless State Procedural Rules.

If petitioner were correct and all "defects" in the composition of state law tribunals resulted in automatic reversal under federal law, that would "federalize" and require automatic reversal for any misapplication of countless state procedural rules—even if state courts found those errors *de minimus* or subject to harmless-error analysis. Such an outcome runs contrary to common sense and settled

law, including the fundamental tenet that constitutional protections have "never depended on the law of the particular State in which" the alleged violation occurs. *Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008) (internal quotations omitted); see generally *Fuller v. Johnson*, 158 F.3d 903, 908 (5th Cir. 1998) (on habeas review, rejecting due process claim that juror whom "Texas law disqualified" sat on jury, where state law violation did not "render[] the trial as a whole fundamentally unfair"); *Patterson*, 215 F.3d at 779-782 (reversal not required even though trial court violated federal jury selection process).

Under petitioner's rule, the vagaries of state law would determine whether otherwise impartial jurors were "unlawful adjudicators." Thus, for example, a court's error in mistakenly seating jurors aged 18, 19, or 20 in Mississippi, see Miss. Code Ann. § 13-5-1 (2008), or Missouri, see Mo. Rev. Stat. § 494.425 (2008), or 18 in Nebraska, see Neb. Rev. Stat. § 25-1601 (2008), would trigger automatic reversal as a matter of federal law, even though these jurors had attained the federal age of majority, see U.S. Const. amend. XXVI, § 1. On the other end of the spectrum, in Connecticut potential jurors over the age of 69 are "disqualified" if they have chosen not to perform jury service. Conn. Gen. Stat. § 51-217(a)(7) (2008). If such a juror were summoned and seated despite having elected not to serve, petitioner's proposed rule would void the entire proceeding.

Whether an otherwise impartial juror would become an "unlawful adjudicator" in this manner would vary from State to State for a host of reasons beyond age. A felon would be an "unlawful adjudicator" as a petit juror in Arkansas but not in Colorado—and in

Connecticut, but only for seven years following conviction. Compare Ark. Code Ann. § 16-31-102(a)(4) (2008) with Colo. Rev. Stat. § 13-71-105(3) (2008) and Conn. Gen. Stat. § 51-217(a)(7).

Under petitioner's rule, moreover, courts, including federal courts on habeas corpus review, would need to undertake fact-intensive inquiries into the minutiae of juror residency patterns. In Colorado, for example, the courts would have to determine that each juror resided in the county more than 50 percent of the time and did not reside outside the county for more than 12 months with no intention of returning. Colo. Rev. Stat. §§ 13-71-105(1), (2)(f) (2008); see also *People v. Williams*, 827 P.2d 612, 613 (Colo. Ct. App. 1992) (juror employed by Air Force and awaiting relocation was eligible in Colorado despite paying income tax and voting in Ohio); 705 Ill. Comp. Stat. § 305/2(1) (2006) (individual must be inhabitant of county to serve as petit juror); Cir. Ct. Cook Cty. R. 0.4(c) (listing zip codes for use in drawing jurors for service in specified "Parts" of the county). "The constitutional standard would be only as easy to apply as the underlying state law." *Moore*, 128 S. Ct. at 1606.

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In sum, petitioner is wrong to claim that every violation of state law governing the composition of the jury, or the assignment of the judge for that matter, requires reversal under federal law. This Court has never recognized such a principle, and it would create a federal remedy (and not just any remedy—automatic reversal) for the violation of innumerable state rules, even where, as here, state law itself refuses to treat

those violations as *ultra vires* or extra-jurisdictional acts that void the resulting judgment.

III. The Denial Of Petitioner's Peremptory Challenge Did Not Violate Any Due Process Right.

As an alternative to the federal, automatic-reversal rule that he seeks, petitioner argues that his alleged state law deprivation rises to a due process violation with three, alternative theories: (1) "improperly constituted tribunals" of any kind violate due process; (2) peremptory challenges reduce the risk or appearance of juror bias, in general or on the facts of this case, and therefore due process requires them; or (3) state law creates a protectable interest in peremptory challenges, and the State may not deprive a defendant of this right without procedural due process.

Any effort to "constitutionalize" the right to a peremptory challenge asks the Court to upend a century of jurisprudence, *see* supra p. 12, and threatens other doctrines that presume the non-constitutional nature of the peremptory right. See, *e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 272-273 (2005) (Breyer, *J.*, concurring) (observing with regard to *Batson* line, "the right to a jury free of discriminatory taint is constitutionally protected—the right to use peremptory challenges is not"). This alone is grounds to reject petitioner's due process theories, but these theories also fail on their own terms.

A. The Due Process Clause Does Not "Constitutionalize" All State Law Rules Capable Of Affecting The Composition Of State Juries.

Petitioner also attempts to ground the proposed rule addressed in Part II—"that proceedings be adjudicated" only by those with state law "authority"—in the federal Due Process Clause. Pet. Br. 19. But this effort fails for the reasons set forth in that Part. It is impossible to square with this Court's rejection of the theory "that any error which affects the composition of the jury must result in reversal," *Ross*, 487 U.S. at 87 n.2, for petitioner urges the Court to adopt precisely that theory. And such a rule would "constitutionalize" all manner of state procedural rules, from technical juror eligibility requirements to rules creating substantive or regional divisions among state courts.

Beyond this, there is no support for petitioner's theory in the authority he cites. *Gomez* does not recognize a due process right to the perfect application of state procedural rules. This was a case about a federal judicial officer "exceed[ing] his jurisdiction" under federal law, and the "basic right" described was the right not to have a case resolved by an *ultra vires* tribunal without any jurisdiction to act. 490 U.S. at 876. The Court did not purport to make this determination as a matter of due process. Rather, the Court based its holding on federal law—the Magistrates Act—and its conclusion that under that law the magistrate behaved in an unlawful, *ultra vires* manner, meaning his decision was without legal effect. See *supra* p. 18. *American Construction* likewise turned on the limits of federal court jurisdiction as a

matter of federal law, see *supra* p. 19, whereas it is for Illinois law to decide whether error resulting in the loss of a peremptory challenge makes the resulting jury verdict a legal nullity.

Finally, petitioner cites *William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645, 650 (1913), for the principle that an unlawfully constituted court is "'virtually no court at all.'" Pet. Br. 20. True enough, as a matter of federal law. See 228 U.S. at 641. But the Court did not purport to announce a rule of constitutional dimension, much less to deprive States of their authority to determine the legal effect of any missteps in the composition of state courts or juries. While some mistakes in the application of state law may produce unconstitutional results, it simply is not *per se* unconstitutional to misapply state law, as petitioner must claim.

B. Neither The Undefined Risk Of Bias In Jurors Not Subject To Removal For Cause, Nor The Specific Facts Of This Case, Requires The Recognition Of A New Due Process Right.

Petitioner also argues that due process entitles him to peremptories because these challenges can reduce the risk or appearance of jury bias, because Gomez or other jurors may have become biased against him, and because the State purportedly obtained an "undue influence over the composition of [his] jury." Pet. Br. 27-37. These claims are meritless, and none is grounds to overturn well settled law and recognize a novel due process right. Indeed, this Court has rejected the argument "that the requirement of an 'impartial jury'

impliedly *compels* peremptory challenges." *Holland v. Illinois*, 493 U.S. 474, 481-482 (1990).

1. There Is No Due Process Right To Peremptories On The Ground That They Reduce The Risk Or Appearance Of Juror Bias.

Petitioner first cites the need for an "'appearance of justice'" and a desire to avoid "'the likelihood or the appearance of [juror] bias.'" Pet. Br. 27 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954), and *Peters*, 407 U.S. at 502). He asks this Court to recognize a constitutional entitlement to peremptories because "actual bias is rarely obvious" in juror questioning, "not all individuals will pick up on * * * nonverbal cues" suggesting bias, and for cause challenges can be difficult to sustain. Pet. Br. 31-34. But petitioner does not complain that the trial court erroneously denied a for cause challenge here, for petitioner never sought to remove Gomez on that basis, nor does he identify any "nonverbal cues" that would have indicated any bias on her part. Instead, petitioner appears to argue that the factors he identifies make for cause challenges imperfect as a general matter, and he seeks to give peremptories a constitutional dimension as an additional, prophylactic defense against the mere "risk" or "appearance" of bias. Pet. Br. 27. This argument fails.

The authority on which petitioner relies does not support making peremptories constitutional; it merely reaffirms the constitutional entitlement to *for cause* challenges. Like *Tumey* and *Murchison*, see *supra* p. 21, *Offutt* involved a judge with a direct stake in the proceedings. He had become "personally embroiled"

with an attorney during trial, to the point where the judge openly "demonstrated a bias and lack of impartiality." 348 U.S. at 16-17 (internal quotations omitted). Because the judge manifested such sustained, "personal animosity" toward counsel, this Court exercised its supervisory power (without invoking due process) to bar the judge from adjudicating the attorney's ensuing criminal contempt charge. *Id.* at 16-18.

The "'likelihood or the appearance of bias'" language on which petitioner relies from *Peters* (Pet. Br. 27), refers to equally compelling evidence of partiality based on an obvious conflict or personal stake in the proceeding. Specifically, *Peters* explained that the "likelihood" or "appearance" of bias at issue there was the same obvious, implied partiality at work in *Tumey* and *Murchison*, where judges had a direct interest in the case's outcome. See 407 U.S. at 502 (Op. of Marshall, *J.*). *Peters* also cited *Turner v. Louisiana*, 379 U.S. 466, 469 (1965), in which the State's two key witnesses were deputy sheriffs who stayed with the sequestered jurors. To be sure, *Turner* involved a mere "likelihood" of bias in that it did not force the defendant to prove that jurors were actually impartial because of their "continuous and intimate association" with the witnesses, *id.* at 473, just as *Tumey* did not require any actual showing that the judge who was paid only for convictions actually convicted defendants out of financial self-interest, *Peters*, 407 at 502 (Op. of Marshall, *J.*) (observing that *Tumey* reversed the judge's decision "notwithstanding the possibility that he might resist the temptation to be influenced by [his financial] interest"). The "prejudice" was simply "inherent" in such an "intimate" relationship between

the jury and the State's lead witnesses, *Turner*, 379 U.S. at 473, just as it would be if a potential juror revealed a direct, personal stake in the outcome of a trial. In short, far from supporting a constitutional right to peremptories, the foregoing cases were based on the same strong evidence of partiality that would support a juror's removal for cause. See, *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 351-355 & n.9 (1966) (rejecting juror assurances of impartiality in light of intense publicity surrounding crime and trial, and summarizing other decisions by Court presuming prejudice notwithstanding juror claims of impartiality); *Conaway v. Polk*, 453 F.3d 567, 586-588 (4th Cir. 2006) (describing history and ongoing prevalence of "implied bias" basis for excusing jurors for cause); *Polichemi*, 219 F.3d at 704 ("[A] court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case.").

Petitioner asks the Court to go far beyond *Offutt*, *Tumey*, and *Turner* and declare a much broader constitutional rule—one that not only entitles parties to exclude jurors exhibiting the sort of implied bias at work in those cases (and that should sustain a for cause challenge), but further entitles parties to remove any juror who poses a less apparent or more indirect potential for bias. Consistent with the constitutional line between for cause and peremptory challenges, however, this Court has never required perfection, such that any slight "risk" or "appearance" of juror bias violates due process. See, *e.g.*, *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("due process does not require a new trial every time a juror has been placed in a potentially compromising situation"); *Nebraska Press*

Ass'n v. Stuart, 427 U.S. 539, 568-569 (1976) (acknowledging "risk that pretrial news accounts * * * would have some adverse impact on the attitudes of those who might be called as jurors," but finding record insufficient to show that additional publicity "would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court").

Petitioner also observes that peremptory challenges enjoy a long history, but this is not grounds to recognize a new due process entitlement, and in any event the history is not nearly as one-sided as petitioner paints it. Contrary to his claim (Pet. Br. 29), the challenges *propter affectum* ("for suspicion of bias or partiality") recognized by Blackstone could not be exercised peremptorily; they were "styled challenges *for cause*" and available "without stint in both criminal and civil trials." 4 William Blackstone, *Commentaries* *353. Peremptory challenges were a separate "arbitrary and capricious species of challenge" allowed to the defendant "in criminal cases, or at least in capital ones." *Ibid.*

Moreover, while Blackstone acknowledged peremptory challenges as part of the English legal tradition, whether they were available to criminal defendants in practice is less certain, for "they were so rarely exercised that some scholars have posited that ordinary criminal defendants simply had no 'right' to any peremptory challenges, despite the pronouncements of Parliament." William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 Am. Crim. L. Rev. 1391, 1413 (2001). Perhaps not surprisingly given their infrequent use, "from 1305

forward, the number of allowable defense peremptory challenges in English criminal trials steadily decreased," before they were abolished altogether in 1989. *Ibid*; see also *Miller-El*, 545 U.S. at 272 (Breyer, *J.*, concurring).

And while petitioner champions the use of peremptory challenges to root out juror bias (Pet. Br. 30), Blackstone acknowledged their deployment for illegitimate purposes. See 4 *Commentaries* *354 (defendants who attempted to exceed their allotted number of peremptories were severely penalized to deter their use to delay trial). Concerns about the improper use of peremptory challenges persist today. See, *e.g.*, *Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, *J.*, concurring) (noting an "unresolvable tension between, on the one hand, what Blackstone called an inherently 'arbitrary and capricious' peremptory challenge system and, on the other hand, the Constitution's nondiscrimination command"); see also Major Robert Wm. Best, *Peremptory Challenges in Military Criminal Justice Practice: It Is Time to Challenge Them Off*, 183 Mil. L. Rev. 1, 64 (2005) (peremptories "are simply a vehicle for insulting stereotypes with the hope that those stereotypes work in a party's favor"); Pizzi & Hoffman, *supra*, at 1429 (peremptory challenges "do not have, and have never had, much to do with selecting impartial jurors").

Finally, petitioner observes that every State currently offers peremptory challenges. Pet. Br. 31 (citing electronic database). But the catalogue of state rules on which petitioner relies also highlights the incredible disparity among jurisdictions in the number of challenges available and in the many other rules surrounding their use. This variety alone, and the

limits States place on the use of peremptories, is impossible to square with the conception of these challenges as a constitutional entitlement. If due process required peremptories to avoid any "risk" or "appearance" of bias, then there could be few if any limits on the number or manner of their use.

2. No Risk Of Bias In This Case Warrants The Recognition Of A Novel Due Process Right.

Although avoiding a risk of bias has never been grounds for recognizing a constitutional entitlement to peremptory challenges, petitioner nevertheless maintains that his proposed rule should apply to his case because the "potential for bias" here was "dramatically highlighted" when his counsel made the contested challenge "in front of Mrs. Gomez and other prospective jurors." Pet. Br. 34. Petitioner overstates the record in making this misplaced argument, however. Although he contends that he was "required" to "announce[]" his challenges "in open court" (Pet. Br. 34), neither Illinois law nor Cook County's local rules demand this. Had petitioner discerned some inherent prejudice in this practice, he could have sought the court's permission to raise his challenges outside of the prospective jurors' presence. Because he did not do so, he may not complain now about the trial court's methods. Moreover, if a juror is presumed biased merely because she knows the defense sought her removal, as petitioner suggests, then defendants could circumvent *Batson* by engaging in prohibited discrimination in the exercise of their peremptory challenges and, when those challenges are properly denied, obtain the challenged jurors' removal for cause

based on "bias" accruing from the challenge process itself.

Further, nothing in either defense counsel's exercise or the trial court's handling of the peremptory challenge raised a risk of bias— "substantial" (Pet. Br. 35) or otherwise. After questioning the third panel, defense counsel informed the trial court—courteously and without elaboration—that, "with thanks, we would ask to exclude Mrs. Gomez." Vol. I at A210. Only once the parties were outside of the prospective jurors' presence did the court request the basis for the challenge. Vol. I at A210-A211. Similarly, after Gomez was questioned a second time, the court waited until she had returned to the jury box before asking the attorneys whether they had further comment. Vol. I at A217-A219. Defense counsel was neither "forced to express his reasons" for striking Gomez in front of her or other prospective jurors, nor did the prosecutor request that the strike be denied in any juror's presence. Pet. Br. 35. The court's care in ensuring that all discussion of Gomez's participation occurred away from prospective jurors, and defense counsel's courtesy in requesting Gomez's excusal, refute any argument that the *voir dire* process might have tainted the jury in this case.

Petitioner's speculation that Gomez may have been biased is also belied by her own testimony. Even when questioned the second time, after counsel asked that she be excused, Gomez stated that she would "be able to fairly view the evidence and follow the instructions and the law." JA 38. Juror assurances that they can be fair and impartial are entitled to weight, see, *e.g.*, *Patton*, 467 U.S. at 1039, and there are no grounds for rejecting them here. Given Gomez's assurances of

impartiality, it is just as plausible that the challenge, if it had any effect at all, merely encouraged her to make every effort to be impartial. Nor is there any reason to conclude that the other jurors chose Gomez as foreperson because of the peremptory challenge, as petitioner speculates. Pet. Br. 35. There are any number of reasons why Gomez might have been selected, including her work experience as a supervisor, or she may have been the only one willing to serve. Either way, there is simply no basis to discredit the jurors' assurances that they, too, could be fair and impartial.

Turning finally to the purported "shift[]" in "the balance of power over the composition of the jury decidedly to the State" (Pet. Br. 36), the prosecution received neither more peremptory challenges than petitioner nor "the right to trump" (*ibid.*) one of his challenges. Of the seven peremptory challenges allocated each side, Vol. I at A4, petitioner exercised four (excluding the disallowed challenge of Gomez) and the prosecution used one, Vol. I at A73, A109, A128, A138; JA 40-41. The trial court alone raised the reverse-*Batson* issue in the first instance and made the decision to seat Gomez, JA 34-36; the prosecution did not "veto" (Pet. Br. 36) one of petitioner's peremptory challenges. In fact, it is *petitioner* who seeks to alter the balance of power, by shifting it to favor the criminal defendant. Under petitioner's proposed rule, if a trial court erroneously overrules two peremptory challenges, one by the State and the other by the defendant, only the defendant automatically receives a new trial. See *State v. Hickman*, 68 P.3d 418, 426 (Ariz. 2003) (automatically reversing erroneous denial

of peremptory challenge "tilts the field in favor of the defendant").

Petitioner's reliance on *Wardius v. Oregon*, 412 U.S. 470 (1973), and *United States v. Harbin*, 250 F.3d 532 (7th Cir. 2001) (Pet. Br. 36), is therefore misplaced. *Wardius* involved an Oregon law requiring criminal defendants to provide pre-trial notice of any alibi defense and supporting witnesses, without demanding reciprocal discovery from the prosecution. See 412 U.S. at 471-472 & n.3. No law or rule requires such differential treatment here; at worst, the trial court erroneously but in good faith seated an unbiased juror by misapplying a *Baston* rule that limits prosecution and defense peremptories alike. If this amounts to a due process violation, it is hard to conceive of a trial court error that would not. And in *Harbin*, the court held that a trial court's "unprecedented" error in allowing the prosecution to exercise a peremptory challenge mid-trial, after it "had significant opportunity to observe the demeanor of the juror, and to assess whether the alternate would be more favorable," warranted automatic reversal because the error did not merely "prevent[] the defendants from maximizing the strategic use of their peremptory challenges"; it allowed the prosecution "exclusive, discretionary control over the composition of the jury mid-trial." 250 F.3d at 537, 547-548.

C. Property-Based Due Process Standards Do Not Apply To State Rules Of Criminal Procedure, But Petitioner Received All The Process He Was Due In Any Event.

Finally, petitioner claims that the trial court's good faith but erroneous decision to seat Gomez "arbitrar[ily]" deprived him of a "protectable interest in the expectation that petitioner's lawful challenge of Ms. Gomez would be respected." Pet. Br. 37-38. This procedural due process claim fails, both because a good faith but erroneous application of state peremptory challenge law does not transgress the Due Process Clause's guarantee of fundamental fairness at a criminal trial, and because petitioner received more than adequate process.

Violation of a state rule of criminal procedure does not offend due process. See *Estelle v. McGuire*, 502 U.S. 62, 67-73 (1991); see also *United States v. Lane*, 474 U.S. 438, 446 & n.8 (1986) (same regarding violation of federal rule of criminal procedure). As this Court has explained, while its cases "have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," "it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure." *Estelle*, 502 U.S. at 70. Petitioner's reliance on *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Pet. Br. 37), is thus misplaced, for those cases addressed due process claims in the civil context. See *Roth*, 408 U.S. at 578 (non-tenured professor had no protected interest in continued employment); *Logan*, 455 U.S. at 429 (discharged employee had protected interest in state

Fair Employment Act's adjudicatory procedures because "the Due Process Clauses protect civil litigants who seek recourse in the courts").

In the criminal context, an error violates due process only if it "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial," *Lane*, 474 U.S. at 446 n.8, or "'so infuse[s] the trial with unfairness as to deny due process of law,'" *Estelle*, 502 U.S. at 75 (quoting *Lisenba v. California*, 314 U.S. 219, 228 (1941)). The Court has "'defined the category of infractions that violate fundamental fairness very narrowly,'" for "'[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" *Estelle*, 502 U.S. at 73 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). This standard is not met here. The most petitioner can show is that the trial court's erroneous denial of his peremptory challenge resulted in the seating of a juror who was qualified to serve under Illinois law and impartial within the meaning of the Sixth Amendment. He cannot demonstrate that the seating of this juror infused the trial with fundamental unfairness. Petitioner's citation of *Logan* also suggests that he would rely on the analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976). But "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which * * * are part of the criminal process." *Medina v. California*, 505 U.S. 437, 443 (1992). The "fundamental fairness" approach applied in criminal cases is "far less intrusive than that approved in *Mathews*." *Id.* at 446.

But even if it were "necessary to ask what process the State provided and whether it was constitutionally

adequate," *Zinermon v. Burch*, 494 U.S. 113, 126 (1990), petitioner plainly received the requisite opportunity to be heard "at a meaningful time and in a meaningful manner," *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) (internal quotations omitted), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330 (1986). Prior to denying the peremptory challenge, the trial court, acting on a good faith belief that the challenge violated *Batson*, heard argument from both sides. JA 34-35. On defense counsel's urging, the court permitted further questioning of Gomez and created a record establishing its rationale for seating her. JA 35-41. Then, after the denial of the peremptory challenge, petitioner received post-deprivation process including two appeals to the Illinois Supreme Court and a supplemental hearing before the trial court. JA 130-132, 136, 157-163. The Illinois courts' comprehensive review of the matter was more than sufficient to satisfy due process. See *Sunal v. Large*, 332 U.S. 174, 182-183 (1947) ("Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process.") (citing *Escoe v. Zerbst*, 295 U.S. 490, 494 (1935) (Cardozo, *J.*, writing for the Court)).

Petitioner's authority (Pet. Br. 37-38) is not to the contrary. *Hicks v. Oklahoma*, 447 U.S. 343 (1980), held that sentencing by a jury unaware of its discretion to impose a lower sentence deprived the defendant of due process because the error actually prejudiced him. Had the jury been properly instructed, there was a "substantial" possibility that it would have returned a lesser sentence, making the imposed sentence

"arbitrary" in violation of due process. *Id.* at 346. In contrast, petitioner seeks automatic reversal, without any showing of prejudice. And because the State provided him with meaningful pre- and post-deprivation process, he cannot claim arbitrary treatment.

That the Illinois Supreme Court ultimately held Gomez should not have been seated does not mean the trial court acted arbitrarily. At worst, the trial court misapplied *Batson* in good faith, though there are strong grounds to conclude that, as the Illinois Appellate Court held, the trial court correctly overruled petitioner's challenge.[3] At the time defense counsel struck Gomez, he had challenged two of three African-American women and used three of four strikes against women, thus appearing to satisfy *Batson*'s easily met first-stage requirement that the court find an "inference of discriminatory purpose." 476 U.S. at 93-94. And when defense counsel confirmed that he had challenged Gomez, at least in part, to get some "impact" from men on the predominantly female jury, the trial court could reasonably conclude that the existence of a *prima facie* case was irrelevant. See *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality op.). "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Ross*, 487 U.S. at 91 (internal quotations omitted).[4] Given that

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[3] This is an independent ground for affirming the judgment below, as set forth in the Brief in Opposition. See Br. in Op. 26-29.

[4] In *Ross*, the Court suggested that a claim that "the trial court repeatedly and deliberately misapplied" a State's law

even negligent deprivations do not violate due process, see *Daniels*, 474 U.S. at 328, a reasonable, good faith error—if the trial court in this case erred at all—does not, either.

Petitioner's reliance on *Douglas v. California*, 372 U.S. 353 (1963), and *Evitts v. Lucey*, 469 U.S. 387 (1985), is equally misplaced. These decisions turn chiefly on alleged equal protection violations—a claim petitioner has never made. *Douglas* held that a State engages in prohibited discrimination against the indigent if it creates an entitlement to a direct criminal appeal without also providing for appointment of counsel. See 372 U.S. at 357 ("[W]e think an unconstitutional line has been drawn between rich and poor."). And *Evitts* extended *Douglas* to guarantee effective counsel on appeal. See *Evitts*, 469 U.S. at 394. Because equal protection principles are irrelevant here, *Douglas* and its progeny are inapposite. To be sure, *Evitts* stated that both due process and equal protection concerns "were implicated in" *Douglas*. 469 U.S. at 405. But equal protection was clearly the predominant analysis. See *Douglas*, 372 U.S. at 357 (referring to "fair procedure" only in passing); *Lewis v. Casey*, 518 U.S. 343, 372 n.3 (1996) (Thomas, *J.*, concurring) (characterizing *Evitts* as "unpersuasive" in its effort to ground the *Douglas* rule in due process). In any event, "as a practical matter" in *Douglas* and its progeny "the * * * Clauses largely converge to require that a State's procedure affor[d] adequate and effective

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of peremptory challenges might violate the Constitution. 487 U.S. at 91 n.5. Of course, no such claim is possible here.

appellate review to indigent defendants." *Smith v. Robbins*, 528 U.S. 259, 276 (2000) (plurality op.) (internal quotations omitted). This means "reasonably ensur[ing] that an indigent's appeal will be resolved in a way that is related to the merit of that appeal." *Id.* at 276-277. Far from the "meaningless ritual" that the Court sought to avoid in *Douglas* and *Evitts*, 372 U.S. at 358; 469 U.S. at 394, petitioner received a meaningful pre-deprivation hearing and full appellate review.

IV. The Erroneous Denial Of A Peremptory Challenge Is Amenable To Harmless-Error Review.

As an "independent reason" for his automatic-reversal rule, petitioner urges that it is impossible to review the erroneous seating of Gomez for harmlessness because one cannot know how a hypothetical "replacement juror" would have "viewed the evidence and participated in deliberations." Pet. Br. 20, 22. As discussed, however, before there can be federal, structural error in this case, there first must be some deprivation of a federal right, and no such deprivation occurred here. And even if seating Gomez violated a federal right, the error still would not qualify as structural, because difficulty of assessment is not the controlling criterion for identifying structural error, and because the effect of the erroneous seating of an unbiased juror is not difficult to assess.

Although "there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule." *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (*per curiam*) (internal quotations omitted). "'[M]ost constitutional errors can be

harmless,'" and this Court has required automatic reversal "only in rare cases." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (quoting *Neder*, 527 U.S. at 8). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption than any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Recuenco*, 548 U.S. at 218 (internal quotations omitted). Accordingly, the Court discounted the statement in *Swain* that "reversal" is required "whenever a defendant's right to a certain number of peremptory challenges is substantially impaired." *Martinez-Salazar*, 528 U.S. at 317 n.4. Not only was this statement *dicta*, the Court reminded, but it "was founded on a series of our early cases decided long before the adoption of harmless-error review." *Ibid.*

Petitioner nevertheless seeks to place the trial court's purported error in the narrow category of structural defects because, he posits, the error's effect "cannot be ascertained." Pet. Br. 22. Even if that were true (and it is not, see *infra* pp. 47-49, 53), there is no "single, inflexible criterion" for identifying structural defects. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). This Court considers multiple "determining factor[s]," including whether the trial was characterized by "fundamental unfairness." *Ibid.* (internal quotations omitted). And it has reviewed for harmlessness even errors that "infringe upon the jury's fact-finding role and affect the jury's deliberative process in ways that are, strictly speaking, not readily calculable," so long as the errors "do[] not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9, 18. True to this approach, Judge

Kozinski has endorsed harmless-error review under the present circumstances—even while acknowledging that it cannot be known to a certainty what would have happened if a replacement juror had been seated. See *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (*en banc*) (Kozinski, *J.*, dissenting) (reaching this result because harmless-error review "reflects more accurately [this] Court's teaching" and preserves "the viability of peremptory challenges"). In short, mere "inability to trace adverse effects to a mistake does not justify reversing a conviction"; to the contrary, it may "show[] instead that there is no warrant for disturbing the judgment." *Patterson*, 215 F.3d at 782 (citing *United States v. Morrison*, 449 U.S. 361 (1981)).

Petitioner is thus wrong to suggest that difficulty in assessment necessarily requires automatic reversal. But even if this were the controlling criterion, there is no such difficulty here. Parties have a right to an impartial jury, not to jurors of their choosing. See, *e.g.*, *Frazier*, 335 U.S. at 508. Thus, the focus of appellate review in cases of purported jury prejudice is "the jurors who ultimately sat," *Ross*, 487 U.S. at 86, specifically, whether any juror was biased and thus challengeable for cause. This is the standard the Court applied in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), where it held that a juror's failure to answer a material question honestly on *voir dire*—"prejudic[ing] [the] right to peremptory challenge"—warranted a new trial only if that failure violated the "right to an impartial jury" because "a correct response would have provided a valid basis for a challenge for cause." *Id.* at 549, 556 (internal quotations omitted); see also *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*) (unrecorded *ex parte*

communications between trial judge and juror were harmless because "the jury's deliberations, as a whole, were not biased").

This is also the standard applied by lower courts rejecting petitioner's automatic reversal rule. See, *e.g.*, *Busby v. Florida*, 894 So.2d 88, 104 & n.14 (Fla. 2004) (noting that majority of state courts have adopted harmless-error rule, but automatically reversing based on *state* constitutional protections); *id.* at 110 & n.23 (Bell, *J.*, concurring in part and dissenting in part); *Klahn v. Wyoming*, 96 P.3d 472, 483 (Wyo. 2004) (majority of state courts have adopted harmless-error rule); *State v. Lindell*, 629 N.W.2d 223, 246 & n.14 (Wis. 2001) (same); *State v. DiFrisco*, 645 A.2d 734, 753 n.1 (N.J. 1994) (22 state courts and several federal circuit courts have adopted harmless-error rule); *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1994) (19 state courts have adopted harmless-error rule).[5] Consistent with *McDonough* and *Rushen*, these courts have reversed only on a showing that "a biased juror actually sat on the jury panel," *e.g.*, *Busby*, 894 So.2d at 104, in other words, where the panel included a juror who was "not qualified to serve" and should have been removed for cause, *e.g.*, *Klahn*, 96 P.3d at 483-484. If none of the jurors were legally objectionable, then the defendant was not prejudiced and the

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[5] These decisions address whether automatic reversal is required where a defendant cured an erroneous denial of a for cause challenge by "wasting" a peremptory challenge. As petitioner has acknowledged, insofar as this kind of error may "result in an individual sitting on the jury who would not have," the issue is the "same" as the question presented here. Pet. 3.

conviction stands, thus avoiding the "disturbing" result of "requir[ing] a new trial in cases," like petitioner's, "where the trial was nearly perfect and the verdict is unquestionably sound." *Lindell*, 629 N.W.2d at 249.

The inquiry into whether any juror was challengeable for cause is easily undertaken, and courts, including this Court, are accustomed to performing it. See, *e.g.*, *Patton*, 467 U.S. at 1036-1040; *Irvin*, 366 U.S. at 727-728. The inquiry is especially straightforward here. Petitioner did not challenge Gomez for cause and has never suggested that she was not legally qualified to serve. JA 164. Gomez gave full and frank answers and repeatedly stated that she would judge petitioner's case fairly, without influence from factors other than the law and the evidence. JA 32-33, 36-38. On this record, the Illinois Supreme Court's holding that "there is no evidence that [petitioner] was tried before a biased jury, or even *one* biased juror" was indisputably correct. JA 164. Thus, even if the trial court erred in denying the peremptory challenge and seating Gomez, that error does not warrant reversal of petitioner's conviction. Petitioner received the impartial jury to which he was entitled.

Moreover, a court undertaking harmless-error review in this manner does not need to "offer[] its own independent evaluation" of "the record as a whole" or otherwise permit the judge, rather than the jury, to determine guilt. Pet. Br. 26. Review for harmlessness therefore does not run afoul of the prohibition on directed verdicts of guilt. See *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In contrast, petitioner's rule, requiring no actual demonstration of bias, raises substantial practical concerns. Without a showing that the seated juror was legally objectionable, the

rebuttable presumption that a juror is impartial, see, *e.g.*, *Irwin*, 366 U.S. at 723, must be ignored or turned on its head. Further, a defendant could peremptorily challenge a clearly neutral or even defense-friendly juror and still be entitled to a new trial merely because the trial court erroneously applied *Batson* in denying the challenge. And by "making every error in th[e] delicate process" of enforcing *Batson* "fatal," *Annigoni*, 96 F.3d at 1151 (Kozinski, *J.*, dissenting), the rule would discourage trial courts from monitoring discriminatory use of peremptory challenges by criminal defendants.

Here, the Illinois Supreme Court went even further. Not only did the court conclude that Gomez was not biased and therefore not removable for cause—alone sufficient grounds to hold that any error in this case was harmless—but the court proceeded to determine that the evidence against petitioner was so "overwhelming" that "any rational trier of fact" would have convicted. JA 164-165, 171. There was nothing improper about this additional inquiry, and it represents an alternative means to assess harmlessness.

In *Neder*, the Court held that the failure to instruct a jury on one element of an offense was subject to harmless-error review, and that the appropriate test for harmlessness was whether "[i]t is clear beyond a reasonable doubt that a rational jury would have found [petitioner] guilty absent the error." 527 U.S. at 15, 18. The Illinois Supreme Court followed *Neder*'s "rational jury" test to the letter. Even petitioner does not challenge the determination that no rational jury would have acquitted him, no doubt because the trial evidence allows no other result. JA 166-169. And

while *Neder* anticipates cases where reversal is required because a court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error," 527 U.S. at 19—for example, because the evidence is closely balanced and thus sufficient to support either a conviction or an acquittal—the Illinois Supreme Court's undisputed findings demonstrate that this is not such a case. Accordingly, even under this more rigorous harmless-error test, petitioner's conviction must stand.

Neder also expressly refutes petitioner's argument that *Sullivan* and other cases prohibiting directed verdicts preclude any "evaluation of whether a rational jury could have acquitted" him. Pet. Br. 26. The Court there emphasized that "[a] reviewing court making this harmless-error inquiry does not * * * become in effect a second jury to determine whether the defendant is guilty." *Neder*, 527 U.S. at 19 (internal quotations omitted). Instead, the "court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding." *Ibid.* The Court acknowledged tension with *Sullivan*, because, as a result of the trial court's error, the jury had not rendered a verdict "on *every* element of the offense," as *Sullivan* seemed to require, 527 U.S. at 11. But the Court overruled *Sullivan* to the extent, if any, that it conflicted with the holding in *Neder*. See *ibid.* ("this strand of the reasoning in *Sullivan* * * * cannot be squared with our harmless-error cases").

Seeking to avoid *Neder*, petitioner both tries to limit that decision to its facts and asserts that the Illinois Supreme Court "misread" it. Pet. Br. 24-26. On petitioner's first point, this Court has never suggested that *Neder*'s import is limited to instructional errors.

And as for the contention that the state supreme court improperly relied on *Neder* "to conduct a wholesale evaluation of the entire record" (Pet. Br. 25), this ignores the distinction between a judge concluding that the evidence cannot rationally support a verdict different from the jury's and the judge reaching a verdict in the first instance. In this regard, this case is a better candidate for harmless-error review than *Neder*. Here, a properly instructed, fully qualified jury rendered a complete verdict against petitioner, and the Illinois Supreme Court merely confirmed that verdict as overwhelmingly supported by the evidence. In no sense did the court "vitiate all the jury's findings," much less make a judgment that a jury never made. See *Neder*, 527 U.S. at 27 ("the 'harmless-error' doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings") (internal quotations omitted) (Stevens, *J.*, concurring in part and concurring in judgment)*; id.* at 38 ("Harmless-error review applies only when the jury *actually renders* a verdict—that is, when it has found the defendant guilty of all the elements of the crime.") (Scalia, *J.*, dissenting).[6]

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[6] Petitioner also argues that the Illinois Supreme Court violated a prohibition against "look[ing] at the quality or quantity of evidence in a particular case" when "determin[ing] *whether* to apply harmless-error analysis" (Pet. Br. 25 n.5) (emphasis added), but that is incorrect. The lower court considered the evidence only after finding that harmless-error analysis applied, to determine whether reversal was warranted under that standard. JA 166-171.

Not only is the Illinois Supreme Court's approach fully consistent with *Neder*, but it raises no problems in application. As explained, see *supra* pp. 46-47, difficulty of assessment is neither the sole nor determining criterion in deciding whether harmless error applies. But in any event it is not difficult to assess the impact of an erroneously seated yet unbiased juror. A reviewing court need merely determine whether the evidence as set forth in the trial record is such that no rational jury would have acquitted. This is an analysis that courts, including this Court, are long accustomed to undertaking. See, *e.g.*, *United States v. Hasting*, 461 U.S. 499, 510-512 (1983) (given "overwhelming evidence of guilt," it was "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" even absent prosecutorial misconduct); *Schneble v. Florida*, 405 U.S. 427, 431-432 (1972) (because evidence of guilt was "overwhelming," "'the minds of an average jury'" would not have changed even absent Confrontation Clause error). The only way petitioner can claim that courts are not capable of this analysis is to engage in forbidden argument that he was entitled to an irrational juror. See *Schneble*, 405 U.S. at 431-432 ("[j]udicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior").

Moreover, because jurors have no role in creating the trial record, harmless-error review under these circumstances cannot be characterized as "a speculative inquiry into what might have occurred in an alternate universe," as in *Gonzalez-Lopez*, 548 U.S. at 150. Jurors receive and process information; they do not create "the framework within which the trial

proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In this regard, jurors differ from attorneys and judges, making cases applying automatic reversal to certain errors in determining legal representation (*Gonzalez-Lopez* and *Holloway v. Arkansas*, 435 U.S. 475 (1978)) and the proper adjudicator (*Wingo* and *William Cramp & Sons*) inapt. Attorneys make "myriad" decisions that determine the very form that the trial record takes: "[d]ifferent attorneys will pursue different strategies," and these strategic choices will affect not only jury selection but also "investigation and discovery," "development of the theory of the defense," "presentation of the witnesses," and the "style of witness examination and jury argument." *Gonzalez-Lopez*, 548 U.S. at 150-151; see also *Holloway*, 435 U.S. at 490-491 (noting diverse "options, tactics, and decisions" available to attorneys). Likewise, judges exercise discretion over what evidence will be disclosed during discovery and admitted at trial, giving them a substantial role in the development of the trial record. Accordingly, when reviewing a juror-seating error for harmlessness, there is no need to imagine what the record would look like under different circumstances.

Petitioner's reliance on *Gonzalez-Lopez* is misplaced for an additional reason. Although the Court there found that the deprivation of an affirmative right—defendant's entitlement to representation by a specific attorney—was not amenable to harmless-error review, petitioner claims a negative right not to have a particular person on his jury. Thus, petitioner's claim is less like the one made in *Gonzalez-Lopez* and more akin to the claim in *Strickland v. Washington*, 466 U.S. 668 (1984), where this Court held that the deprivation of an analogous negative right—the defendant's right

not to be represented by the particular, ineffective attorney who handled his case—does not require automatic reversal but instead is reviewed for prejudice. See *id.* at 687, 695.

Cases finding structural error in certain mistakes affecting jury composition (*Vasquez* and *Peters*) are likewise inapposite. As explained, see *supra* pp. 24-25, the *Vasquez* rule was a response to the "overriding imperative to eliminate" discrimination in grand jury selection; difficulty of assessment was but a secondary consideration to the deterrence rationale. 474 U.S. at 264. Equally important, the *Vasquez* rule is limited to errors in grand jury selection, because grand juries, unlike petit juries, have discretion to act notwithstanding the evidence. See *id.* at 263 ("the grand jury is not bound to indict in every case where a conviction can be obtained") (internal punctuation omitted).[7] This freedom makes it impossible to discern whether "the need to indict would have been assessed in the same way by a grand jury properly constituted," *id.* at 264, and thus equally impossible to apply the "rational jury" rule. As for *Peters*, that decision was similarly driven by a desire to eradicate purposeful and systemic race discrimination in jury selection. See *supra* p. 24. In addition, Justice Marshall's opinion that discrimination in the composition of a defendant's

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[7] Contrary to petitioner's suggestion (Pet. Br. 22), only four members of the Court in *Vasquez* subscribed to the proposition that reversal is required whenever "a petit jury has been selected upon improper criteria * * * because the effect of the violation cannot be ascertained." 474 U.S. at 263 (Marshall, *J.*, with three Justices concurring and one Justice concurring in the judgment).

grand *and* petit juries warranted automatic reversal did not command a majority.

In short, there is no serious dispute that petitioner received a fair trial by an impartial jury and that the trial evidence overwhelming favored his conviction. Any error in this case was harmless for either of these independent reasons.

CONCLUSION

The decision of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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